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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 848

PASQUALE ALBANESE, et al.,
Petitioners,

vs.

SACRAMENTO COUNTY BOARD OF EQUALIZATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on November 28, 1962.[1]

[1]Petitioners consist of Pasquale Albanese, Clementine Albanese, Andrew S. Allen, A. G. Allen, Norma L. Allen, Henry W. Backer, Jr., John A. Backer, Phillip Backer, Alvin D. Bartholomew, Amy L. Bartholomew, Jack Baumann, Sophie Baumann, Muriel

CITATIONS TO OPINIONS BELOW

The denial of petitioners' petition for Writ of Review, without a hearing or opinion, by the District Court of Appeal, Third Appellate District, of the State of California is unreported. The denial of a hearing without opinion by the Supreme Court of the State of California is unreported.

M. Blodgett, Louis J. Blodgett, Henry C. Buscher, Agnes C. Buscher, Frank Buscher, Herbert Buscher, Henry Buscher, Margaret W. Bush, Executrix of the estate of Margaret F. Waegell, George Waegell, James Waegell, Jack Waegell, Margaret W. Bush, Ernest D. Carli, Louis Carli, Clinton C. Castello, Leonard Dietrich, Lela B. Dietrich, Walter Dillard, Genevieve Dillard, Marty Therese Enjalran, James H. Fairbairn, Jr., Freda B. Fehring, Laura Wasson, Margaret Jillson, Adam Fieckert, David Fieckert, Manual Fernandez, Raimunda Fernandez, Sven Forsberg, Corinne Forsberg, Ethel Gallagher, O. C. Gallagher, Orlan Glantz, Helen J. Glantz, Frank P. Grech, Josephine Grech, Green and McKeown Farms, Inc., Hamatani Bros., The Herzog Company Inc., William E. Hansen, Leonard W. Hastie, Virginia E. Hastie, Charles Hauschildt, M. E. Hauschildt, Joseph Hospenthal, Freda Hospenthal, Harold K. Huntsberger, John P. Iros, Justo Sanzberro, Johan H. Jonson, Elsie Jonson, Marvin B. Jones, Soloman Kammerer, Martha Kammerer, August H. Kloss, Gussie Kloss, C. Henry Lent, Sophie I. Lent, Frank Loretz, Ida Loretz, [illegible] Loretz, Antonio Machado, Marie Machado, John W. Mahon, Clara S. Windmiller, Elvin Morse, Nicolaus Farms, Inc., Kokon Oshiro, Akiyo Oshiro, Alvin C. Ostman, Lesley M. Ostman, William T. Pierson, L. J. Reis, Janice E. Reis, Mabel J. Schmidt, Christian Schuler, Adelena Schuler, Jacob A. Schultz, Mary Schultz, Ruth Schultz, Irene M. Sharp, Joe M. Simoes, Leona Simoes, Theodmiro M. Soares, Mary A. Soares, M. E. Souza and Sons, Hans Sutter, Benton C. Sweet, Louise C. Sweet, George Swortfiguer, Lucille Swortfiguer, Henry J. Voos, Howard P. Wackman, Executor of the Estate of C. C. Wackman, A. H. Watson, Spencer L. Wilcox, Tessie M. Wilcox and Rose Zgraggen.

Respondents consist of Leslie E. Wood, Fred A. Barbaria, Jack Mingo, Mike R. Malaki and Aneil Hoffman, Members of the Board of Supervisors of Sacramento County sitting and acting as the County Board of Equalization, and Richard Blechschmidt, Sacramento County Assessor.

JURISDICTION

The order denying petitioners' petition for a hearing before the Supreme Court of the State of California was filed on November 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), since a right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether a County Board of Equalization may preclude the reasonable presentation of evidence and cross-examination of adverse witnesses by imposition of a five minute time limitation and preclude argument upon the evidence altogether, while conducting quasi-judicial type hearings on the matter of equalization of ad valorem property tax assessments, where the determination of such Board is a conclusive adjudication of facts under State law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and Statutory provisions involved are Amendment XIV, Section 1 to the Constitution of the United States; Article I, Section 13, Article XI, Section 12 and Article XIII, Section 9 of the Constitution of the State of California; Sections 110, 401, 1601, 1603, 1607, 1608, 1609, 5136 and 5138 of the Revenue and Taxation Code of the State of California; Section 1068 of the Code of Civil Pro-

cedure of the State of California. They are printed in Appendix A, *infra*.

STATEMENT OF THE CASE

Petitioners are the owners of certain real property situate in the County of Sacramento, State of California. Said property was assessed for the purpose of ad valorem property taxation by the Assessor of the County of Sacramento for the fiscal year 1962-63 as of the first day of March, 1962. Petitioners duly applied for a reduction of said assessments to the Board of Supervisors of the County of Sacramento convened as the County Board of Equalization (hereinafter referred to as the Board) pursuant to Article XIII, Section 9 of the Constitution of the State of California.

Said Board convened in July 1962 for the purpose of hearing and determining applications for reductions in assessments for the 1962-63 fiscal year. Appellants were, at the times of their respectively scheduled hearings, present and prepared to offer testimonial and documentary evidence concerning unequally assessed values of similar property similarly situate, zoning laws, market values of the subject property, methods of appraisal, comparable sales, and other factual matters tending to indicate the unequal and excessive nature of said assessments.

As petitioners respectively duly appeared, said Board limited their total time per parcel owned within which to present their case in chief, including

all documentary and testimonial evidence, to five minutes. Petitioners were respectively permitted five minutes to cross-examine adverse witnesses. Appellants respectively were not permitted to argue their contentions. In other particulars the atmosphere of said hearings may fairly be characterized as unfair to petitioners in that some hearings were conducted at midnight and later, unpleasant innuendoes, clandestine conferences of adverse witnesses with persons not under oath, and direct intimidations by the Board were not infrequent. The Board denied all of petitioners' respective applications for reduction in assessment.

Petitioners initially sought protection of their right to a "fair hearing" as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in the District Court of Appeal, Third Appellate District, of the State of California by submitting a timely petition to that Court for a Writ of Review pursuant to Sections 1068 et seq. of the Code of Civil Procedure of the State of California. Said petition contained allegations fairly presenting the constitutional question presented herein, that of a denial of due process of law. (Petition to District Court of Appeal, 3 Civ. 10605, pp. 18, 23.) Petitioners' petition was denied without a hearing or opinion on October 31, 1962. Petitioners thereafter submitted a timely petition for hearing to the Supreme Court of the State of California. Said petition contained allegations fairly presenting the constitutional question presented herein, that of a denial of due process of law.

(Petition to State Supreme Court, 3 Civ. 10605, p. 8.) Petitioners' petition was denied without a hearing or opinion on November 28, 1962.

REASONS FOR GRANTING THE WRIT

The refusal of the Supreme Court of the State of California to compel respondents to afford petitioners a "fair hearing" where evidence is introduced, witnesses cross-examined, and arguments presented, is not in accord with the Fourteenth Amendment of the Constitution of the United States as interpreted by this Court in *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908); *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1912); and *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U.S. 275, 69 S.Ct. 1103, 93 L.Ed. 1353 (1949). The mandate of those decisions must be enforced in this action for the reason that if this attack, based upon a lack of procedural due process, fails, petitioners will be relegated to their attack upon a lack of substantive due process pursuant to Sections 5136 et seq. of the Revenue and Taxation Code of the State of California. Petitioners' dilemma is that the abuse here complained of prevented the introduction of evidence, cross-examination of witnesses, and argument, the product of which would have been a full and complete record upon the basis of which a substantive due process attack *could* be launched.

Under the law of the State of California, the Board of Equalization is empowered and compelled to conduct a quasi-judicial type hearing where evidence is adduced, witnesses cross-examined and contentions argued, for the purpose of equalizing property tax assessments. (See Article XIII, Section 9 and Article I, Section 13 of the Constitution of the State of California; Sections 110, 401, 1601, 1603, 1608 and 1609 of the Revenue and Taxation Code of the State of California.) Under state law, the decision of the Board after such a hearing is a conclusive adjudication of the facts. (See e.g., *Bank of America v. Mundo*, 37 Cal.2d 1, 229 P.2d 345 (1951); *Consolidated Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746 (1944); *Alberts v. Board of Supervisors of San Mateo*, 193 Cal.App.2d 225, 14 Cal.Rptr. 72 (1961)). Aggrieved taxpayers may seek judicial review of the Board's determination pursuant to Sections 5136 et seq. of the Revenue and Taxation Code of the State of California. However, the issue then before the reviewing Court is the substantiality of the evidence adduced, i.e., a substantive due process attack. (See e.g., *Simms v. Los Angeles County*, 35 Cal.2d 303, 217 P.2d 936 (1950); *Southern Pacific Sand Co. v. The County of San Diego*, 183 Cal. 543, 191 Pac. 931 (1920).) Where the Board, as here, refuses to adduce adverse evidence, the scope of judicial review necessarily precludes taxpayer relief since the only evidence in the record necessarily would support the Board's determination. It is for that reason that a method of compelling compliance with procedural due process is afforded by Sections 1068 et

seq. of the Code of Civil Procedure of the State of California which is precisely the relief petitioners sought herein and which has been denied by the Courts of the State of California.

Petitioners may never obtain the opportunity to present their meritorious claim for relief on the substantive due process claim that the Board's determination was not based upon evidence and amounted to constructive fraud, because the reviewing Court's eyes, by state law, will only be able to see the contents of the record; not what would have been in the record had the board afforded petitioners their due process right to a "fair hearing." *Bank of America v. Mundo, supra, Consolidated Oil Co. v. Byram, supra, Alberts v. Board of Supervisors of San Mateo, supra.* In a nutshell, petitioners will not be entitled to a trial de novo under state law wherein evidence not previously before the Board may then be introduced. *Bank of America v. Mundo, supra, Consolidated Oil Co. v. Byram, supra, Alberts v. Board of Supervisors of San Mateo, supra, Eastern-Columbia Inc. v. County of Los Angeles,* 61 Cal.App.2d 734, 143 P.2d 992 (1943).

This Court should here enforce those rights it has previously declared, for such other reasons as appear with particularity in the record, and for the further reason that the consequences of this variety of State action are drastic as respects hundreds of taxpayers. They, in addition to petitioners, in the future as well as currently, are entitled to a forum where evidence may be produced to substantiate their claim that the

taxes as levied are unequal as respects like property similarly situated to their own and are confiscatory in that they in many instances exceed the total income from the property, in some instances necessitating the incurrence of indebtedness to meet such tax obligations, and in other instances necessitating sale of the property at prices deflated by oppressive taxation. They, like petitioners, are entitled to launch a substantive due process attack against such taxes but will discover that the predicate for such an attack is wanting so long as they, like petitioners, are denied their right to present evidence, here sought to be enforced. Thus, if the Board discovers that it can dictate the course of its equalization hearings, with impunity, then countless taxpayers in the future are subject to the fiat of the Board. And as suburban development extends coincident to ever increasing population growth, surrounding agricultural areas necessarily recede, requiring for the purpose of ad valorem property taxation, *new factual determinations of value*. The taxpayers must be given a fair opportunity to participate in such factual determinations or inevitably they will not be factual but only mere formalities and in effect ex parte, the very antithesis of due process of law. This argument is not conjectural. For example, petitioners' property was assessed for the fiscal year 1961-62 at substantially identical values as for the fiscal year 1962-63. Yet the Board reduced the former assessments voluntarily, having realized that said property is restricted in its highest and best use by geographical, topographical,

flooding and other factors. No substantial value-reducing factors having varied between the 1961-62 and 1962-63 assessments, the Board arbitrarily and without so much as considering value, refused to reduce said assessments for the latter period. That action exemplifies a conclusive and substantially ex parte *factual determination* against which petitioners here seek relief. At the very least, petitioners herein and taxpayers in general are entitled to be heard.

CONCLUSION

For the foregoing and such other reasons as will appear from a review of the record, this petition for a writ of certiorari should be granted.

Dated, Sacramento, California,
February 10, 1963.

Respectfully submitted,

DAVID G. MCINNES,
RICHARD F. DESMOND,
LOUIS N. DESMOND,
Counsel for Petitioners.

(Appendix A Follows.)

[redacted]

Appendix A

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 13, Constitution of the State of California.

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the

jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

Article XI, Section 12, Constitution of the State of California.

Sec. 12. Except as otherwise provided in this Constitution, the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

All property subject to taxation shall be assessed for taxation at its full cash value.

Article XIII, Section 9, Constitution of the State of California.

Sec. 9. A State Board of Equalization, consisting of four members, shall be elected by the qualified electors of their respective districts, at each gubernatorial election, whose term of office shall be for four years; whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the board. The boards of supervisors of the several counties of the

State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in such roll; provided, that no board of equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured, money, or solvent credits, above its face value. The present State Board of Equalization shall continue in office until their successors, as herein provided for, shall be elected and shall qualify. The Legislature shall have power to redistrict the State into four districts as nearly equal in population as practical, and to provide for the elections of members of said Board of Equalization.

STATUTORY PROVISIONS INVOLVED

Section 110, Revenue and Taxation Code of the State of California.

"Value," "full cash value," or "cash value" means the amount at which property would be taken in payment of a just debt from a solvent debtor. In determining the "actual value" of intangible personal property, the assessor shall not take into account the existence of any custom or common method, if any, in arriving at the full cash value of any class or classes of property.

Section 401, Revenue and Taxation Code of the State of California.

Except as provided in this part, all taxable property shall be assessed at its full cash value.

Section 1601, Revenue and Taxation Code of the State of California.

Immediately on receipt of the local roll from the assessor, the clerk shall give notice of the completion of the local roll and of the time the county board will meet to equalize assessments by publication in a newspaper, if any is printed in the county, or, if none, as directed by the board of supervisors.

Section 1603, Revenue and Taxation Code of the State of California.

Annually, on the first Monday in July, the board of supervisors shall meet as the county board of equalization to equalize the assessment of property on the local roll. It shall continue in session for that pur-

pose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July.

Section 1607, Revenue and Taxation Code of the State of California.

A reduction in any assessment on the local roll shall not be made unless the party affected or his agent makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction.

Section 1608, Revenue and Taxation Code of the State of California.

Before the county board makes any reduction, it shall examine, on oath, the person affected or the agent making the application touching the value of the property. A reduction shall not be made unless the person or agent attends and answers all questions pertinent to the inquiry.

Section 1609, Revenue and Taxation Code of the State of California.

On the hearing of the application, the county board may subpena witnesses and take evidence in relation to the inquiry.

Section 5136, Revenue and Taxation Code of the State of California.

After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5138, Revenue and Taxation Code of the State of California.

Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 1068, Code of Civil Procedure, State of California.

A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.